

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 6, 2015 appellant, then a 52-year-old motor vehicle operator (MVO) driver, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained right leg, neck, and back injuries when his vehicle was rear ended by another vehicle. By decision dated April 22, 2015, OWCP accepted the claim for lumbar sprain and neck sprain. It later expanded acceptance of the claim to include sprain of right shoulder and upper arm, right shoulder rotator cuff tear, cervical disc disorder with myelopathy, right shoulder bicipital tendinitis, and right shoulder impingement syndrome. Appellant stopped work and first sought medical treatment on the date of injury. He received continuation of pay from March 7 through April 20, 2015.

Appellant filed claims for compensation (Form CA-7) for leave without pay (LWOP) beginning April 21, 2015 and continuing. OWCP paid him compensation for temporary total disability by direct deposit on the supplemental rolls as of April 21, 2015 and paid wage-loss compensation and medical benefits on the periodic rolls as of June 28, 2016.²

In a September 16, 2016 medical report, Dr. Ryan M. Siwiec, appellant's treating physician, reported that appellant could return to full-duty work with no restrictions beginning October 3, 2016.

In an October 18, 2016 CA-110 telephone memorandum, the employing establishment notified OWCP that appellant had not returned to work and had been on sick leave since October 3, 2016 because of his son's medical condition. The employing establishment explained that appellant had submitted paperwork under the Family and Medical Leave Act (FMLA). It noted that he continued to remain off work under FMLA, had been getting paid sick leave for all scheduled days since October 3, 2016, and that he knew that he was no longer entitled to receive workers' compensation.³

A payroll computer printout documented that appellant received wage-loss compensation from September 18 through October 15, 2016.

By letter dated December 15, 2016, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,055.48 from October 3 through 15, 2016 because he was paid by the employing establishment for sick leave while also receiving FECA compensation for the same period. It noted that he received \$1,055.48 in compensation for total disability from October 3 through 15, 2016, which he was not entitled to

² On April 25, 2015 appellant elected to receive his compensation benefits by direct deposit. By letter dated May 27, 2015, OWCP advised appellant that his payment for wage-loss compensation had been approved for the period April 21 through May 15, 2015. OWCP instructed, "If you return to work (or returned to work) during this period, it is your responsibility to notify this office immediately. Any payment made by the Division of Federal Employees' Compensation (DFEC) during a period of work or leave will be considered an overpayment subject to recovery."

³ On November 9, 2016 OWCP notified appellant of a proposal to terminate his wage-loss compensation benefits as the weight of the medical evidence established that he was no longer disabled from work as a result of the March 6, 2015 work injury. It did not propose to terminate his medical benefits, which would remain open if treatment was still needed for his accepted conditions.

as the employing establishment began paying him sick leave on October 3, 2016. OWCP further found that he was at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known that he was not entitled to receive. A manual adjustment form and Employment Standards Administration worksheet noted that appellant was on the periodic rolls with a 28-day net compensation of \$2,273.36 for the period September 18 through October 15, 2016. However, appellant was only entitled to compensation from September 18 through October 2, 2016 in the net amount of \$1,217.88. Taking the 28-day \$2,273.36 net compensation and subtracting from it the \$1,217.88 he should have received during that period resulted in a \$1,055.48 overpayment for the 13 days of compensation paid from October 3 through 15, 2016. OWCP informed him of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form (OWCP-20) and submit supporting documentation.

On December 22, 2016 appellant submitted an overpayment action request contesting the overpayment and finding of fault and requested that the district Office make a decision based on review of the written evidence. He reported that he called his supervisor and requested sick leave because his son was ill. Appellant argued that a case worker was going to handle the situation so that he did not need to call the Department of Labor (DOL).

On January 8, 2017 appellant submitted an overpayment recovery questionnaire Form OWCP-20). He listed monthly income of \$3,483.00, monthly expenses of \$3,786.00, and total funds in the amount of \$155,312.50. Appellant explained that he did not know that he was overpaid because he went on sick leave on October 3, 2016 due to his son's illness. He argued that he did nothing wrong as he notified his supervisor who changed his status to sick leave. Appellant stated that his son passed away from cancer on November 14, 2016 and he had numerous medical bills to pay as a result of his son's illness.

By decision dated April 28, 2017, OWCP finalized the preliminary determination finding that appellant was overpaid in the amount of \$1,055.48 from October 3 through 15, 2016 because he received sick leave while also receiving disability compensation. It found that appellant was at fault in the creation of the overpayment and thus, not entitled to waiver of recovery of the overpayment. Recovery was directed by submitting a check for the full amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁵ The Board has determined that if an employee receives sick leave from

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8116(a).

the employing establishment at the same time he is being paid compensation, this will cause an overpayment.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,055.48 from October 3 through 15, 2016 because he received sick leave while also receiving disability compensation.⁷

Appellant was not entitled to receive wage-loss compensation under FECA as he was receiving sick leave from the employing establishment.⁸ The record establishes that appellant began using and receiving sick leave from the employing establishment on October 3, 2016. OWCP determined that appellant received an overpayment of compensation for the period October 3 through 15, 2016 as he received sick leave from the employing establishment at the same time he received wage-loss compensation under FECA. In its preliminary overpayment determination, it explained that appellant received net compensation in the amount of \$2,273.36 for the 28-day period from September 18 through October 15, 2016. However, appellant was only entitled to compensation from September 18 through October 2, 2016 in the amount of \$1,217.88. Taking the difference of the 28-day \$2,273.36 compensation received from the \$1,217.88 he should have received resulted in a \$1,055.48 overpayment for the 13 days of compensation paid from October 3 through 15, 2016.

As OWCP explained how the overpayment occurred, and provided this to appellant with the preliminary notice of overpayment, there is no evidence that the overpayment did not occur as found by OWCP.⁹ Appellant did not dispute the calculation or amount of the overpayment. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,055.48 from October 3 through 15, 2016.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹¹ provides that an overpayment of compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² Thus, OWCP may not waive the overpayment of compensation

⁶ *E.V.*, Docket No. 10-1284 (issued February 3, 2011).

⁷ *T.R.*, Docket No. 15-1374 (issued September 16, 2016).

⁸ *Id.*

⁹ *T.B.*, Docket No. 15-1871 (issued January 13, 2016).

¹⁰ *R.W.*, Docket No. 13-1108 (issued September 10, 2013).

¹¹ 5 U.S.C. § 8129(b).

¹² *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

unless appellant was without fault.¹³ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁴

On the issue of fault, section 10.433 of OWCP's regulations provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”¹⁵

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁶

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or reasonably should have known to be incorrect. The Board finds, however, that OWCP failed to establish that, at the time appellant accepted the initial payment of compensation, he knew or should have known the payments were incorrect.¹⁷

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time the claimant received the direct deposit in question that he knew or should have known that the payment was incorrect.¹⁸ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁹ Because fault is defined by what the claimant knew or reasonably should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.²⁰ Whether or not OWCP

¹³ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹⁴ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at § 10.433(b).

¹⁷ *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

¹⁸ *See Claude T. Green*, 42 ECAB 174, 278 (1990).

¹⁹ *See Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

²⁰ *Id.*

determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.²¹ It is inappropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.²²

Herein, appellant received one payment electronically for the period September 18 through October 15, 2016. Although it was deposited into his account, OWCP has not shown that he knew or reasonably should have known at the time of the deposit that the payment was incorrect. It has not presented sufficient evidence to establish that appellant accepted a payment which he knew or reasonably should have known to be incorrect.²³ Appellant had no reason to suspect at the time of the October 15, 2016 deposit that OWCP had issued an incorrect payment since this was the first incorrect payment made. Thus, the Board finds that appellant was not at fault in either creating or accepting the overpayment for the period October 3 through 15, 2016.²⁴

A finding of no fault, however, does not mean that the claimant may keep the money, only that OWCP must consider eligibility for waiver of recovery for this period of overpayment and the case must be remanded for it to determine whether appellant is entitled to such a waiver for this period. After such further development as OWCP may find necessary, it should issue an appropriate decision on the issue of whether the recovery of the overpayment should be waived for the relevant portion of the October 15, 2016 direct deposit.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,055.48 for the period October 3 through 15, 2016. The Board further finds that OWCP improperly found him at fault in the creation of the overpayment. The April 28, 2017 decision is set aside in part and remanded to OWCP regarding the issue of waiver of recovery of the overpayment.

²¹ *Id.*; see also *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

²² See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

²³ See also *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

²⁴ *V.A.*, Docket No. 12-0637 (issued August 27, 2012).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: December 5, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board